

MORRISON & FOERSTER LLP

ATTORNEYS AT LAW

SAN FRANCISCO
LOS ANGELES
DENVER
PALO ALTO
WALNUT CREEK
SACRAMENTO
CENTURY CITY
ORANGE COUNTY
SAN DIEGO

2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20006-1888
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

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NEW YORK
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SINGAPORE
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August 30, 2004

Writer's Direct Contact

202/887-6931
jrlichter@mofo.com

By Messenger

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc., Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

RECEIVED

AUG 30 2004

Federal Communications Commission
Office of Secretary

**Re: WT Docket No. 03-66
Petition for Reconsideration
Florida Atlantic University
Dismissed Modification Application for WHR901
(File No. 19950524DD)**

Dear Ms. Dortch:

On behalf of Florida Atlantic University and its excess capacity lessee WBSWP Licensing Corporation, and pursuant to Sections 1.51, 1.106 and 1.429 of the Commission's rules, please find attached an original and fourteen (14) copies of a Petition for Reconsideration of the Commission's decision on July 29, 2004 to dismiss the above-referenced modification application. The Commission's decision to dismiss the modification application was contained in Exhibit E to the Report and Order released in the following proceeding: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 03-66, FCC 04-135 (July 29, 2004).

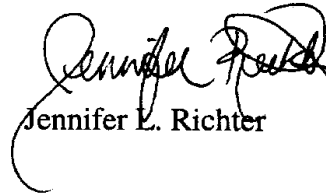
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MORRISON & FOERSTER LLP

Marlene H. Dortch, Secretary
August 30, 2004
Page Two

Please date-stamp one enclosed copy of this submission and return it to my attention in the self-addressed, stamped, return envelope. Should any questions arise regarding this filing, please communicate directly with the undersigned. Thank you.

Respectfully submitted,



Jennifer L. Richter

Federal Communications Commission
Office of Secretary

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dc-390142

exclusivity with the FAU Modification Application.⁴ However, based upon a 1996 Public Notice (discussed below), Petitioners believe the Commission intended that Exhibit E of the *Report and Order* would list as mutually exclusive (and that the *Report and Order* would dismiss) an application filed by the School Board of Dade County for Miami, Florida (the “Dade Application”).⁵ Regardless, the FAU Modification Application is not mutually exclusive with any previously proposed or licensed facilities, including the facilities proposed in the Dade Application. The Dade Application is fatally defective, should never have been accepted for filing, should have been dismissed nine (9) years ago, and certainly should be dismissed now.⁶ The FAU Modification Application should be reinstated and processed.

⁴ *Report and Order*, Appendix E, Dismissed Mutually Exclusive ITFS Applications.

⁵ The Dade Application was filed on September 15, 1995 (File No. 19950915ZA), and was accepted for filing by the Commission on September 30, 1996. In addition to the fatal defects in the Dade Application discussed in this Petition, the Dade Application is also defective because it was filed as an amendment to an application that was granted six (6) months earlier (File No. 940819DE). The application was, therefore, a modification application filed outside of an authorized filing window and not submitted pursuant to any exception to the then applicable filing freeze. *See Amendment of Part 74 of the Commission’s Rules With Regard to the Instructional Television Fixed Service*, Report and Order, 10 FCC Rcd 2907, 2910–11 (1995), effective May 25, 1995, 60 Fed. Reg. 20241 (Apr. 25, 1995), as amended 60 Fed. Reg. 28546 (June 1, 1995) (major modifications or amendments with the same effect will not be exempted from the window filing requirement).

⁶ Other applications filed for Miami are similarly defective under Section 74.903 for reasons of harmful interference and should have been dismissed years ago: (1) Modification application filed by the Friends of WLRN, Inc., File No. BMPLIF950515DA, as modified by a May 22, 1995 application (missing consent letter from the School Board of Broward County); (2) Modification application filed by the School Board of Dade County regarding KTB85, File No. BMPLIF19950915HW (missing consent letter from the School Board of Broward County). Petitioners note that the KTB85 application was correctly dismissed pursuant to the *Report and Order* as mutually exclusive.

The Commission's 1996 Designation of the FAU Modification Application and the Dade Application as Mutually Exclusive Was in Error.

In 1996 the Commission released a Public Notice, *ITFS Applications Accepted for Filing*,⁷ which listed the FAU Modification Application and the Dade Application as mutually exclusive (the “1996 MX Notice”). Petitioners timely filed a Petition to Deny asserting that the 1996 MX Notice improperly listed the Dade Application as acceptable for filing. Petitioners explained that the Dade Application is fatally and fundamentally flawed, unacceptable for filing and, therefore, *not* mutually exclusive with the FAU Modification Application.⁸ The Petition to Deny remained pending when, in October of 1998, the Commission released a Public Notice encouraging settlements between mutually exclusive applicants (the “1998 Public Notice”).⁹ WBSWP responded to the 1998 Public Notice by reiterating that the 1996 MX Notice finding of mutual exclusivity between the FAU Modification Application and the Dade Application was in error because the Dade Application was unacceptable for filing and should be dismissed.¹⁰

Had the Commission properly dismissed the Dade Application pursuant to Sections 74.910 and 73.3566 of the Commission's rules as unacceptable for filing in 1995,¹¹ then the

⁷ See FCC Public Notice, *ITFS Applications Accepted for Filing*, Report No. 23836B (rel. Sept. 30, 1996).

⁸ See, *Petition to Dismiss or Deny*, filed by WBSWP on November 1, 1996 (“Petition to Deny”). See also, *Reply*, filed by WBSWP on March 5, 1997; *Opposition*, filed by Wireless Broadcasting Systems of America, Inc. (parent of WBSWP) on February 21, 1997.

⁹ FCC Public Notice, *ITFS Mutually Exclusive Applications – Settlement Period*, 13 FCC Rcd 20380 (Oct. 15, 1998).

¹⁰ Letter from Counsel in Response to FCC Public Notice, *ITFS Mutually Exclusive Applications – Settlement Period*, DA 98-2070 (Nov. 12, 1998). (“1998 Counsel Letter”)(Attached hereto as Exhibit 1).

¹¹ 47 C.F.R. §§ 74.910, 73.3566. Section 73.3566 is applicable to ITFS through Section 74.910 of the rules. Section 73.3566 states: “Applications which are determined to be patently not in accordance with the FCC rules, regulations or other requirements, unless accompanied by

(Footnote continues on next page.)

Dade Application would not have been listed as mutually exclusive with the FAU Modification Application in the *1996 MX Notice*. In addition, had the Commission properly responded to the Petition to Deny and subsequent pleadings filed by the Petitioners in 1996, 1997 and 1998 by dismissing the defective Dade Application, the FAU Modification Application would not have been dismissed as mutually exclusive pursuant to the 2004 *Report and Order*.

The Dade Application is Fatally Defective, Unacceptable for Filing, and Should be Dismissed.

The Dade Application is fatally defective because it predicts harmful interference to a previously licensed station, WHR897, in clear violation of Section 74.903 of the Commission's rules.¹² In addition, and in the alternative, the Dade Application does not contain an interference consent letter from the licensee of WHR897 as required by Section 74.903(b)(4) of the rules.¹³ The Dade Application violates the Commission's rules.

The station to which the Dade Application predicts interference, WHR897, is licensed to FAU for operation of Instructional Television Fixed Service ("ITFS") channels in Ft. Lauderdale, Florida. This station serves different receive sites than the FAU station in Boynton Beach, FL (WHR901), which is the subject of the FAU Modification Application. Each station is part of FAU's microwave network in southern Florida, and each is critical to the service of FAU's multiple campuses and receive site schools.

The School Board of Dade County concedes in the Dade Application that the proposed facilities will cause harmful interference to FAU's WHR897 facilities and receive sites in Ft.

(Footnote continued from previous page.)

an appropriate request for waiver, will be considered defective and will not be accepted for filing, or if inadvertently accepted for filing will be dismissed."

¹² *Id.* § 74.903.

¹³ *Id.* § 74.903(b)(4).

Lauderdale in violation of Section 74.903 of the Commission's rules.¹⁴ Absent an interference consent letter from FAU, however, the Dade Application is unacceptable for filing under Section 74.903(b)(4).¹⁵ FAU expressly informed the Commission, by letter dated October 30, 1996, that it will not supply such a consent letter, that "no measure of interference" to WHR897 is acceptable, and that:

[FAU] fully expect[s] to be afforded with 45 dB D/U protection at this site and all of our other sites. The School Board's proposed modification has demonstrated that it cannot achieve the FCC-required level of protection to FAU's Main Campus. In the interest of fairness and protection of our facilities, we fully expect that the FCC will not accept this application for filing, nor will it allow this application to move forward for grant.¹⁶

Accordingly, the Dade Application was unacceptable for filing as an initial matter and should have been dismissed. The Broadband Division of the Wireless Telecommunications Bureau (the "Bureau"), the Private Wireless Division of the Bureau and the Video Services Division of the Mass Media Bureau, each of whom has had (or has, in the case of the Broadband Division) jurisdiction over ITFS, have all affirmed that consent letters from affected parties must be filed with the original application.¹⁷ The Dade Application did not contain the required

¹⁴ See, Dade Application, Exhibit E-4, p.1.

¹⁵ 47 C.F.R. § 74.903(b)(4).

¹⁶ See Letter from Chancellor Charles B. Reed, Chancellor of the State University System of Florida, to William F. Caton, Secretary, Federal Communications Commission, October 30, 1996 (attached hereto as Exhibit 2). FAU is part of the state university system of Florida.

¹⁷ See *Wireless Cable of Florida*, 19 FCC Rcd 6390, 6392 (2004) ("The Commission has recently affirmed that consent letters must be filed with the original application because 'considering consent letters that did not exist at the time the original application was filed encourages the filing of incomplete applications and places an undue burden on the Commission's limited resources.'" citing *Educational Television Association of Metropolitan Cleveland, Inc.*, 18 FCC Rcd 15117, 15120 (2003).); see also *Centre Unified School District #397*, 18 FCC Rcd 19235, 19238 (2003) ("The Commission's Rules require applicants to submit consent letters from the affected parties with the original application. Pursuant to Section 74.903 of the Commission's Rules, an application for an ITFS station must protect previously proposed

(Footnote continues on next page.)

consent letter from FAU and, as FAU noted to the Commission, such a consent letter will not be granted due to the importance of WHR897 to FAU's educational mission. By not demonstrating interference protection to WHR897, and not obtaining an interference consent letter from FAU, the Dade Application violates Commission rules and precedent and must be dismissed.

Conclusion.

Exhibit E of the *Report and Order* incorrectly identifies the FAU Modification Application as mutually exclusive. The FAU Modification Application is not mutually exclusive with any previously proposed or licensed station, including the fatally defective Dade Application. The Dade Application should have been dismissed years ago pursuant to Commission rules and precedent that require the filing of interference consent letters with applications that predict interference with previously proposed or existing licensed stations. Had the Commission timely dismissed the Dade Application, the FAU Modification Application would not have been dismissed pursuant to the *Report and Order*.

Petitioners request that the Commission expeditiously reinstate the FAU Modification Application for processing. The FAU Modification Application is a critical part of a Marketwide Settlement Agreement¹⁸ filed with the Commission by FAU and other interested parties in

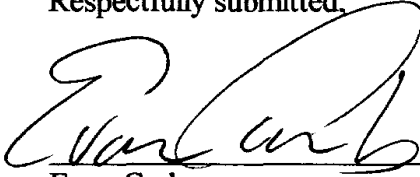
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facilities from interference and will not be granted if interference is predicted to occur.”); *Bartlesville Public Schools*, 18 FCC Rcd 18103, 18105 (2003) (“The Commission’s Rules require applicants to submit consent letters from the affected parties with the original application.” citing *Guadalupe Valley Electric Cooperation*, 11 FCC Rcd 7434, 7442-43 (1996); *In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites*, 10 FCC Rcd 1335, 1465-66 (1994); *Family Entertainment Network, Inc.*, 9 FCC Rcd 566, 567-68 n.10 (1994).).

¹⁸ The Marketwide Settlement Agreement is discussed in further detail in a Petition for Reconsideration that is being filed simultaneously herewith with respect to the dismissal of a collocation application filed by WBSWP Licensing Corporation for KZB30, the H-group channels in Boynton Beach (File No. 9550910).

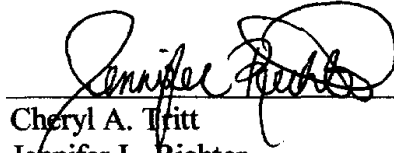
the West Palm Beach – Boca Raton market.¹⁹ FAU requests that its Modification Application be reinstated and processed as part of the Marketwide Settlement Agreement.

Respectfully submitted,



Evan Carb
RJGLaw LLC
8401 Ramsey Avenue
Silver Spring, MD 20910
(301) 589-2999

Attorney for Florida Atlantic University



Cheryl A. Tritt
Jennifer L. Richter
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
(202) 887-1500

Attorneys for WBSWP Licensing Corporation

Dated: August 30, 2004

¹⁹ See, *Marketwide Settlement Agreement and Joint Motion for Approval of Settlement and Request for Waiver of Cut-Off Rules*, filed May 24, 1995 (attached hereto as Exhibit 3).

CERTIFICATE OF SERVICE

I, Michael Rodgers, do hereby certify that I have on this 30th day of August 2004, had copies of the foregoing **PETITION FOR RECONSIDERATION** delivered to the following via electronic mail or by overnight delivery as indicated:

Bryan N. Tramont
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, DC 20554
Via Electronic Mail: btramont@fcc.gov

Barry Ohlson
Office of Commissioner Adelstein
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, DC 20554
Via Electronic Mail: bohlon@fcc.gov

Jennifer Manner
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, DC 20554
Via Electronic Mail: jmanner@fcc.gov

John Schauble
Public Safety and Private Wireless Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
Via Electronic Mail: jschaubl@fcc.gov

Paul Margie
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, DC 20554
Via Electronic Mail: pmargie@fcc.gov

Sam Feder
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, DC 20554
Via Electronic Mail: sfeder@fcc.gov

D'Wana Terry
Public Safety and Private Wireless Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
Via Electronic Mail: dterry@fcc.gov

Nancy Zaczek
Public Safety and Private Wireless Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C124
Washington, DC 20554
Via Electronic Mail: nzaczek@fcc.gov

Charles Oliver
Public Safety and Private Wireless Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C124
Washington, DC 20554
Via Electronic Mail: coliver@fcc.gov

Stephen Zak
Public Safety and Private Wireless Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C124
Washington, DC 20554
Via Electronic Mail: szak@fcc.gov

Gary Michaels
Auctions and Industry Analysis Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A760
Washington, DC 20554
Via Electronic Mail: gmichael@fcc.gov

Catherine Seidel
Office of the Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
Via Electronic Mail: cseidel@fcc.gov

Andrea Kelly
Auctions and Industry Analysis Div.
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A760
Washington, DC 20554
Via Electronic Mail: akelly@fcc.gov

Qualex International
Portals II
445 12th Street, SW
Courtyard Level
Washington, DC 20554
Via Electronic Mail: qualexint@aol.com

School Board of Dade County
1410 NE 2nd Ave.
Miami, FL 33132
By Overnight Delivery

John Labonia
Friends of WLRN, Inc.
172 N.E. 15th Street
Miami, FL 33132
By Overnight Delivery

John Labonia
South Florida Instructional TV, Inc.
172 N.E. 15th Street
Miami, FL 33132
By Overnight Delivery

Robert A. Saunders
Bell South Wireless Cable Inc.
754 Peachtree Street 14th Floor
Room D1487
Atlanta, GA 30308
Via Electronic Mail:
bob.saunders@bellsouth.com


Michael Rodgers

EXHIBIT 1

**Letter to FCC
November 12, 1998**



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE BOISE CHARLOTTE HONOLULU LOS ANGELES PORTLAND RICHLAND SAN FRANCISCO SEATTLE WASHINGTON, D.C. SHANGHAI

JAMES S. BLITZ
Direct (202) 508-6605
jimblitz@dwf.com

SUITE 700
1155 CONNECTICUT AVENUE NW
WASHINGTON, D.C. 20036-4313

TEL (202) 508-6600
FAX (202) 508-6699
www.dwt.com

November 12, 1998

Clay C. Pendarvis, Esq., Acting Chief
Distribution Services Branch
Video Services Division
Mass Media Bureau
Federal Communications Commission
1919 M St., N.W., Room 702
Washington, D.C. 20554

RECEIVED

12 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Application to Modify ITFS Station WHR-901, Palm Beach, Florida
Florida Atlantic University
File No. BMPLIF-950524DD

Application to Modify ITFS Station WHG-230, Miami, Florida
School Board of Dade County, Florida
File No. BMPLIF-950915ZA

Dear Mr. Pendarvis:

On October 15, 1998, the Commission released a Public Notice reminding ITFS applicants of a settlement period for mutually exclusive ITFS applications.¹ In light of that Public Notice, WBSWP Licensing Corp ("WBSWP"), by its attorneys, herein asks that the Commission reconsider its September 30, 1996 Public Notice announcing that the above-referenced applications had been accepted for filing and, upon initial review, found to be mutually exclusive.² Upon such reconsideration, WBSWP requests that the Commission dismiss the application to modify Station WHG-230 (the "WHG-230 Application").

As WBSWP has explained in this proceeding, the WHG-230 Application was defective at the time it was filed, remains defective, and should immediately be dismissed.³ The primary reason for this

¹ See "ITFS Mutually Exclusive Applications - Settlement Period," DA 98-2070.

² See "ITFS Applications Accepted For Filing," Report No. 23836B. WBSWP has entered into an agreement with Florida Atlantic University ("FAU") to lease the excess channel capacity of FAU's ITFS Station WHR-901 in connection with a wireless cable system that WBSWP is developing in the West Palm Beach, Florida market.

³ See WBSWP "Petition to Dismiss or Deny," November 1, 1996; WBSWP "Reply," March 5, 1997.

Clay C. Pendarvis, Esq., Acting Chief
November 12, 1998
Page 2

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dismissal is the objectionable interference that the applicant itself disclosed that the proposed facilities proposed would cause to ITFS Station WHR-897, Ft. Lauderdale, Florida, which is licensed to FAU.⁴ Under the Commission's Rules, the Commission may not even process the WHG-230 Application unless the Board supplies a "no-objection letter" from FAU.⁵

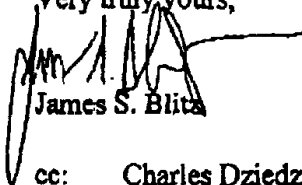
In this case, not only was no such letter ever provided, but FAU has expressly stated that it will never supply the no-objection letter required in order for the WHG-230 Application to be processed. The Commission has been informed that "no measure of interference to this site is acceptable" to Station WHR-897 and that the licensee:

"fully expect[s] to be afforded with 45 dB D/U protection at this site and all of our other sites. The School Board's proposed modification has demonstrated that it cannot achieve the FCC-required level of protection to FAU's Main Campus. In the interest of fairness and protection of our facilities, we fully expect that the FCC will not accept this application for filing, nor will it allow this application to move forward for grant."⁶

In light of this unequivocal statement that the School Board of Dade County, Florida will never receive the "no-objection" letter that it needs in order to validate the WHG-230 Application, the Commission should not have accepted the application to begin with. For this reason and the other reasons discussed in WBSWP's filings against the WHG-230 Application, the Commission should promptly dismiss the WHG-230 Application as a defective application that is patently not in accordance with the Commission's Rules. 47 C.F.R. §§ 73.3566, 74.910.

Should any questions arise in connection with this matter, please communicate directly with the undersigned.

Very truly yours,



James S. Blita

cc: Charles Dziedzic, Esq.
Mr. Melvin Collins
Paul J. Sinderbrand, Esq.
William D. Wallace, Esq.
E. Ashton Johnston, Esq.

⁴ See WHG-230 Application, Exhibit E-4, p. 1.

⁵ See 47 C.F.R. § 74.903(b)(4). Moreover, the Commission will not necessarily grant an application simply because an affected ITFS licensee has supplied a no-objection letter.

⁶ Letter from Chancellor Charles B. Reed, Chancellor of the State University System of Florida, to William F. Caton, October 30, 1996. FAU is a part of the State University System of Florida.

EXHIBIT 2

**Letter from Chancellor
Charles B. Reed
October 30, 1996**



STATE UNIVERSITY SYSTEM OF FLORIDA

325 West Gaines Street, Tallahassee, Florida 32399-1930

October 30, 1996

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
Room 222
1919 M. Street N.W.
Washington, D.C. 20554

Attention: Clay Pendarvis
Melvin Collins

Dear Mr. Caton:

Florida Atlantic University (FAU) is the licensee of WHR-897, the C-group ITFS channels in Ft. Lauderdale, Florida. The School Board of Dade County is the licensee of WHG-230, the C-group of channels in Miami, Florida.

On September 15, 1995, the School Board proposed a modification to WHG-230 under file number DMPLIF 950052A. This modification is predicted to cause harmful electrical interference to all six of the received sites associated with WHR-897. The application states that the interference to five of the receive sites can be alleviated through antenna upgrades, but the interference to receive site R-6 cannot be cured. The School Board states that it is "contemplating securing consent regarding interference predicted to receive site R-6."

The School Board has not secured a consent letter from FAU, and the university cannot accept interference to receive site R-6. This site is FAU's Main Campus and no measure of interference to this site is acceptable. FAU serves hundreds of students with distance learning at the Main Campus. In addition, the Main Campus is an integral component of FAU's entire ITFS system, as it is used as a checkpoint for FAU's main transmission facilities. The Main Campus site is central to FAU's existing distance learning system and all of its future plans. We fully expect to be afforded with 45 dB D/U protection at this site and all of our other sites. The School Board's proposed modification has demonstrated that it cannot achieve the FCC-required level of protection to FAU's Main Campus. In the interest of fairness and protection of our facilities, we fully expect that the FCC will

AN EQUAL ACCESS/OPPORTUNITY—AFFIRMATIVE ACTION SYSTEM

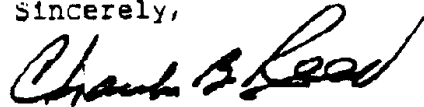
University of Florida • Florida State University • Florida A&M University • University of South Florida • Florida Atlantic University
Gainesville Tallahassee Tallahassee Tampa Boca Raton
University of West Florida • University of Central Florida • Florida International University • University of Miami • Florida Gulf Coast University
Pensacola Orlando Miami Jacksonville Ft. Myers

Mr. William F. Caton
October 28, 1996
Page 2

not accept this application for filing nor will it allow this
application to move forward for grant.

With kind regards,

Sincerely,

A handwritten signature in black ink, appearing to read "Charles B. Reed". The signature is fluid and cursive, with a large, sweeping "C" at the beginning and a long, horizontal stroke extending to the right.

Charles B. Reed
Chancellor

CBR/ibf

cc: Dr. Anthony J. Catanese

EXHIBIT 3

**Marketwide Settlement Agreement
and Joint Motion for Approval
Filed with the FCC on May 24, 1995**

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTHANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
LOUISE CYBULSKI *
L. CHARLES KELLER *
MICHAEL J. LEHMAUM *
SUZANNE C. SPINK *
* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI
L. L. P.
ATTORNEYS AT LAW
200 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D. C. 20006
(202) 296-0600

2379F - Aids
FILE COPY
We
Palm
app
GREGG R. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986
FORD (202) 296-5572
INTERNET: REP@CORCOMMLAW.COM

RECEIVED
MAY 24 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 24, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

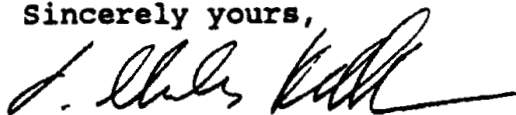
Re: ITFS Joint Motion for Approval of Settlement
West Palm Beach, Florida

Dear Mr. Caton:

There is transmitted herewith an original and four (4) copies of a Joint Motion for Approval of Settlement and Request for Waiver of Cut-off Rules. The settlement resolves mutually-exclusive proposals for the D group channels in West Palm Beach, Florida, by proposing a market-wide channel reallocation and collocation plan.

Should there be any question with respect to this filing, please communicate directly with the undersigned.

Sincerely yours,

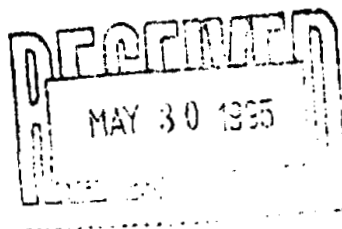


L. Charles Keller
Counsel to Wireless Broadcasting
Systems of America, Inc.

Enclosures

cc: Jennifer L. Richter, Esq.
William D. Wallace, Esq.
Mr. W. Douglas Trabert
Mr. Michael J. Specchio

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Applications of)	
)	
)	
The School District of Palm)	Petition for Displacement of KHU-90; KZB-28
Beach County, Florida)	KZB-29; WHR-973; WHR-994; KZB-30
)	
People's Choice TV, Inc.)	WMI841
)	
The Board of Regents, A Public)	BPLIF-920814DB; WLX-269; WHR-877;
Corporation of the State of Florida)	WHR-894; WHR-895; WHR-896;
on behalf of Florida Atlantic University)	WHR-897; WHR-901
)	
Wireless Broadcasting Systems of)	
West Palm Beach, Inc.)	
)	
For Construction Permit and License,)	
Modification, and/or Assignment of)	
Facilities in the Instructional)	
Television Fixed and Multichannel)	
Multipoint Distribution Services in the)	
West Palm Beach, Florida, Area)	

To: Chief, Video Services Division

**JOINT MOTION FOR APPROVAL OF SETTLEMENT
AND
REQUEST FOR WAIVER OF CUT-OFF RULES**

The School District of Palm Beach County, Florida (the "District"), People's Choice TV, Inc. ("PCTV"), Wireless Broadcasting Systems of West Palm Beach, Inc. ("WBS-WP) and the Board of Regents, a Public Corporation of the State of Florida, on behalf of Florida Atlantic University (the "University"), by counsel, hereby submit their Joint Motion for Approval of Settlement and Request for Waiver. In support thereof, the parties respectfully show as follows:

I. Approval of Settlement

These proceedings involve PCTV's, WBS-WP's and the University's mutually exclusive applications concerning stations in the Instructional Television Fixed Service ("ITFS") on the D group channels in the West Palm Beach, Florida, market (the "Market"). Also involved are the parties' proposals to modify existing and proposed ITFS facilities in the Market and to submit others for cancellation in order to allow for better and more spectrum-efficient service to the parties' receive sites.

PCTV's and WBS-WP's proposal to migrate the District's D group station is contained in the Petition for Displacement and application (the "Displacement Application") filed on December 29, 1993.¹ The University's D group proposal is contained in the application in file no. BPLIF-920814DB. PCTV is the conditional licensee of MMDS E group station WMI841. This station cannot be constructed or operated because of the District's grandfathered E group ITFS facility, station KHU-90. WBS-WP is a wireless cable operator currently developing a wireless cable system in the Market which will include PCTV's E group station. Accordingly, PCTV and WBS-WP filed the Displacement Application on December 29, 1993. WBS-WP entered into excess capacity lease agreements with the University in July 1994 and the District in January 1995.

To provide for the private resolution of the mutually exclusive D group proposals, to achieve better and more spectrum-efficient service to the educational licensees' receive sites, and to allow for the commercial use of the E group channels and the development of a wireless cable system in the Area, the parties have entered into a Market Settlement Agreement ("Agreement"),

¹ With respect to the Displacement Application, WBS-WP is the successor to WJB-TV Ft. Pierce Limited Partnership, whose name appeared in the Displacement Application.

which is attached hereto as Exhibit 1. The parties respectfully request the Commission's approval of the Agreement.

At present, though a large number of ITFS stations are operating from various sites in the Market, these stations are not designed, constructed, or operated in a coordinated manner. Some stations are used as repeaters or relay stations. Several stations have been in existence for many years and do not employ the latest and best available technology. No commercial MDS/MMDS stations are operational in the area. As described above, PCTV, the commercial E group conditional licensee, has been unable to construct its E group station because of the District's grandfathered ITFS station on the same frequency group. Finally, the H group channels are not available for commercial use because they are presently utilized by the District.

The parties to the Agreement constitute the licensees or applicants for all of the ITFS and MDS/MMDS channels (except MDS channels 1 and 2A) in the Market. The arrangements outlined herein have been the subject of negotiations between various of these parties for over two years. Through this settlement the parties expect to accomplish the following:

1. to resolve the mutual exclusivity between the D group ITFS applications;
2. to ensure that each of the stations is able to reach all desired educational receive sites in Palm Beach County, thus eliminating the present use of duplicate stations, point-to-point stations, and repeater stations;
3. to ensure the most economical and efficient usage of the spectrum and eliminate disputes between the parties as to that usage;
4. to coordinate the operation and maintenance of these stations, thus taking advantage of possible economies of scale and efficiencies;
5. to collocate all of the ITFS and MDS/MMDS stations in the market at a single transmitter site, thus reducing the possibility of interference between these stations;
6. to develop modern, efficient ITFS systems for both the University and the

District;

7. to allow for the development of a wireless cable television system to serve the public and provide competition in the multichannel video delivery marketplace in the Market;
8. to generate royalties for the benefit of the University and the District to provide a source of funding for their instructional television ventures; and
9. to allow for the carriage by the wireless cable television system of at least some of the District's and the University's programming, so as to enable the public to receive in-home instructional programming, possibly for credit.

A summary of the necessary filings is attached hereto as Exhibit 2.

WBS-WP and PCTV have committed to comply with the requirements of the Commission's Rules and policies for involuntary ITFS migration, as they relate to the posting of a bond and other matters, in the event the Displacement Application is granted.

As attested in the attached declarations, no monetary consideration was exchanged among the parties in consideration for the settlement, and no applications were filed in order to procure the settlement. Because the public interest, convenience and necessity would best be served thereby, the parties respectfully request the Commission to approve the attached Market Settlement Agreement.

II. Request for Waiver of Cut-off Rules

The District and the University also respectfully request waiver of the Commission's cut-off rules in the processing of the major modification applications, and major amendments to pending applications, filed to accommodate the settlement. Waiver of the cut-off rules for major change applications may be granted to accommodate settlement agreements between mutually-exclusive applicants. Memorandum Opinion and Order in MM Docket No. 83-523 (Instructional Television Fixed Service Reconsideration), 59 RR 2d 1355, 1381 n.47 (1986).

Although mutually exclusive applications exist only for the D group, the parties request waiver of the cut-off rules as to all applications described in the Agreement. A summary of these applications is attached hereto as Exhibit 2. Such a waiver is justified for four reasons.

First, the broader channel rearrangement and collocation plan contemplated by the Agreement was necessary to resolve the competing D group proposals. Without the channel reorganization plan, which is only possible through collocation, the D group settlement will collapse. Thus, all of the modifications listed in Exhibit 2 are necessary to the resolution of the mutual exclusivity and therefore fall within the ambit of footnote 47.

Second, the public interest will best be served by waiving the cut-off rules as to all applications contemplated in the settlement, because the settlement provides for optimal use of the microwave spectrum in the Market. In addition to eliminating duplicative and inefficient use of ITFS frequencies, the applications contemplated in the settlement will allow for use of the E and H channels for the commercial use to which they are primarily allocated.

Third, granting waiver of the cut-off rules to all of the applications will not extend waiver beyond the parties whose mutually exclusive proposals are resolved in the settlement.

Fourth, the channel reorganization plan will allow WBS-WP to provide competitive, wireless cable operations to the Market. There is no such competition now. Rapid implementation of wireless cable service will serve the Commission's goals for commercial use of the MMDS/ITFS spectrum.

WHEREFORE, the parties respectfully request that the Commission approve the attached Market Settlement Agreement, exempt the applications it describes from the cut-off rules, and expeditiously process the applications filed in furtherance hereof.

Respectfully submitted,

SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

By William D. Wallace

William D. Wallace
Its Attorney

CROWELL & MORING
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2807

Respectfully submitted,

The Board of Regents, a Public Corporation
of the State of Florida, on behalf of
FLORIDA ATLANTIC UNIVERSITY

By _____

Gregg Gleason
General Counsel

BOARD OF REGENTS' OFFICE
325 West Gaines St., Suite 1522
Tallahassee, Florida 32399
(904) 488-5441

PEOPLE'S CHOICE TV, INC. and
WIRELESS BROADCASTING SYSTEMS
OF WEST PALM BEACH, INC.

By _____

L. Charles Keller
Their Attorney

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

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SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

By _____
William D. Wallace
Its Attorney

CROWELL & MORING
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2807

Respectfully submitted,

The Board of Regents, a Public Corporation
of the State of Florida, on behalf of
FLORIDA ATLANTIC UNIVERSITY

By Gregg A. Gleason
Gregg Gleason
General Counsel

BOARD OF REGENTS' OFFICE
325 West Gaines St., Suite 1522
Tallahassee, Florida 32399
(904) 488-5441

PEOPLE'S CHOICE TV, INC. and
WIRELESS BROADCASTING SYSTEMS
OF WEST PALM BEACH, INC.

By L. Charles Keller
L. Charles Keller
Their Attorney

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

May 24, 1995

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MARKET SETTLEMENT AGREEMENT

THIS MARKET SETTLEMENT AGREEMENT ("Agreement") is entered into by and among the School District of Palm Beach County, Florida (the "District"); The Board of Regents, a Public Corporation of the State of Florida, on behalf of Florida Atlantic University (the "University"); Wireless Broadcasting Systems of West Palm Beach, Inc. ("WBS-WP"); and People's Choice TV, Inc. ("PCTV").

WHEREAS, the District is the licensee of Instructional Television Fixed Service ("ITFS") stations KZB-28 on the A group at Belle Glade, Florida; KZB-29 on the G group at Riviera Beach, Florida; WHR-973 on channel G3 at West Palm Beach, Florida; WHR-994 on channels G2-G3 at West Palm Beach, Florida; KZB-30 on channels H1-H3 at Loxahatchee, Florida; and KHU-90 on the E group at Boynton Beach, Florida, which is the subject of a Petition for Displacement to the D group channels.

WHEREAS, the University is the licensee of ITFS stations WLX-269 on the A group at Palm Beach, Florida; WHR-877 on the A group at Boca Raton, Florida; WHR-894 on the A group at Boca Raton, Florida; WHR-895 on the A group at Boca Raton, Florida, WHR-896 on the B group at Boynton Beach, Florida; WHR-897 on the C group at Ft. Lauderdale, Florida; WHR-901 on the C group at Palm Beach, Florida; and is the applicant in File No. BPLIF-920814DB for the D group channels at Palm Beach Florida;

WHEREAS, the District and the University currently use some of their ITFS channels either as repeaters or as relays;

WHEREAS, PCTV is the conditional licensee of Multichannel Multipoint Distribution Service ("MMDS") station WMI841 on the E group channels at West Palm Beach, Florida;

WHEREAS, WBS-WP is a wireless cable operator and the lessee of the District's and the University's excess capacity, which WBS-WP will use in a wireless cable television system it is developing to serve the West Palm Beach metropolitan area. WBS-WP has affiliates presently operating similar systems in Melbourne and Fort Pierce, Florida; Sacramento, California; Boise, Idaho; and acquiring a system in Yakima, Washington;

WHEREAS, PCTV cannot construct or commence operating its E group station WMI841 until the District ceases operation of its E group station KHU-90;

WHEREAS, on December 29, 1993, PCTV and WBS-WP filed a Petition for Displacement and Application (the "Displacement Application") to modify KHU-90 to specify operation on the D group channels;

WHEREAS, the Displacement Application is mutually exclusive with the University's D group application (File No. BPLIF-920814DB), making grant of both applications impossible;

WHEREAS, the parties wish to reach a mutually agreeable settlement of their differences;

WHEREAS, the parties recognize that the microwave spectrum in the West Palm Beach metropolitan area could be used more efficiently by centralizing the origination point for all channels and eliminating use of ITFS frequencies as repeaters and/or

relay stations, and allowing commercial use of the E group channels and the H channels;

WHEREAS, the District and the University each recognizes that its ITFS purposes can more efficiently be served by a collocated operation of ten channels each at fifty watts, located on the District's Boynton Beach transmit tower (the "Collocation Site");

NOW, THEREFORE, in consideration of the mutual promises and conditions contained herein, the parties hereto, intending to be legally bound, hereby agree as follows:

1. To accommodate the settlement, PCTV, WBS-WP, the University and the District agree to resolve the mutually exclusive proposals for the D group ITFS channels by dividing the four channels between the University and the District. Accordingly, the University agrees to modify its application in File No. BPLIF-920814DB to specify operation on channels D3-D4 only, and the WBS-WP and PCTV agree to the modification of the Displacement Application to specify operation of KHU-90 on channels D1-D2 only. Furthermore, the District agrees not to object to displacement of station KHU-90 to channels D1-D2, and agrees to relocate the D1-D2 facilities to the Collocation Site.

2. To accommodate the settlement, the University will submit to the FCC for cancellation its authorizations for stations WLX-269, WHR-877, and WHR-894. The University will retain its B group and C group licenses for WHR-896 and WHR-901, respectively, and these facilities will be moved to the Collocation

Site so that more spectrum-efficient service to all of its receive sites is possible. The University will also retain its authorizations for stations WHR-895 and WHR-897, which stations will be used in the Ft. Lauderdale area, configured so as not to cause harmful interference to stations operating from the Collocation Site.

3. To further accommodate the settlement, the District will modify its G group authorization for KZB-29 and its A-group authorization for KZB-28 to collocate these facilities with WBS-WP's system. The District will submit to the FCC for cancellation its licenses for WHR-973 and WHR-994. Further, the District agrees to the assignment of its H channel facility (KZB-30) to WBS-WP, and the relocation of the H channel facility to the Collocation Site.

4. To further accommodate the settlement and eliminate potential interference, PCTV agrees to the relocation of its E group facility WMI841 to the Collocation Site.

5. The parties agree to cooperate with one another with respect to the filing of the applications and other papers required by this Agreement and agree not to interpose any objection to any filing which is consistent with this Agreement.

6. The parties agree to file the FCC applications required to effectuate this Agreement on or about the same day and to seek concurrent processing for all such applications. The parties agree that the modifications contemplated by the settlement will be installed concurrently so as to complete installation and

testing efficiently. The parties agree to coordinate the cut-over date with the University's and the District's educational schedules.

7. Whenever the context of this Agreement so requires, words used in the singular shall be construed to mean or include the plural and vice versa, and pronouns of any gender shall be construed to mean or include any other gender or genders.

8. This Agreement may not be modified or amended, except by a written instrument signed by each of the parties designating specifically the terms and provisions so modified and amended.

9. Each signatory to this Agreement represents that he or she has full legal authority to enter into, execute and perform the obligations of this Agreement. This Agreement shall be binding upon and inure to the benefit of the parties, their heirs, successors and assigns.

10. This Agreement may be signed in one or more counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this
Market Settlement Agreement as of the dates written below.

THE BOARD OF REGENTS, a Public Corpora-
tion of the State of Florida, on behalf
of Florida Atlantic University

Date: 5/12/95

By Charles B. Reed
Charles B. Reed, Chancellor

THE SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

Date: _____

By _____
Jody Gleason, Chairman

Date: _____

By _____
C. Monica Uhlhorn, Superintendent

WIRELESS BROADCASTING SYSTEMS OF WEST
PALM BEACH, INC.

Date: _____

By _____
William Kingery, President

PEOPLE'S CHOICE TV, INC.

Date: _____

By _____
Michael J. Specchio, President

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Market Settlement Agreement as of the dates written below.

THE BOARD OF REGENTS, a Public Corpora-
tion of the State of Florida, on behalf
of Florida Atlantic University

Date: _____

By _____
Charles B. Reed, Chancellor

THE SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

Date: April 26, 1995

By _____
Jody Gleason, Chairman

Date: April 27, 1995

By _____
C. Monica Uhlhorn, Superintendent

WIRELESS BROADCASTING SYSTEMS OF WEST
PALM BEACH, INC.

Date: _____

By _____
William Kingery, President

PEOPLE'S CHOICE TV, INC.

Date: _____

By _____
Michael J. Specchio, President

LCK/ld
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Market Settlement Agreement as of the dates written below.

THE BOARD OF REGENTS, a Public Corpora-
tion of the State of Florida, on behalf
of Florida Atlantic University

Date: _____

By _____
Charles B. Reed, Chancellor

THE SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

Date: _____

By _____
Jody Gleason, Chairman

Date: _____

By _____
C. Monica Uhlhorn, Superintendent

WIRELESS BROADCASTING SYSTEMS OF WEST
PALM BEACH, INC.

Date: 4/20/95

By Jennifer Richter
Jennifer L. Richter, Vice-President
PEOPLE'S CHOICE TV, INC.

Date: _____

By _____
Michael J. Specchio, President

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Market Settlement Agreement as of the dates written below.

THE BOARD OF REGENTS, a Public Corpora-
tion of the State of Florida, on behalf
of Florida Atlantic University

Date: _____

By _____
Charles B. Reed, Chancellor

THE SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

Date: _____

By _____
Jody Gleason, Chairman

Date: _____

By _____
C. Monica Uhlhorn, Superintendent

WIRELESS BROADCASTING SYSTEMS OF WEST
PALM BEACH, INC.

Date: _____

By _____
William Kingery, President

PEOPLE'S CHOICE TV, INC.

Date: 5/22/95

By 
Michael J. Specchio, President

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Declaration of Michael J. Specchio

I, Michael J. Specchio, declare follows:

1. I am President of People's Choice TV, Inc., which is a party to the foregoing Market Settlement Agreement related to the West Palm Beach, Florida, area;

2. I certify that no monetary consideration was exchanged among the parties in consideration for the settlement; and

3. I certify that People's Choice TV, Inc. did not file any of the affected applications in order to procure the Settlement.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the United States.



Michael J. Specchio, President

Date: 5/22/95

Declaration of Charles B. Reed

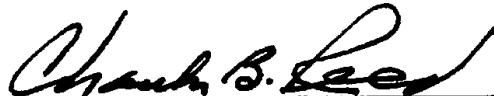
I, Charles B. Reed, declare follows:

1. I am Chancellor of The Board of Regents, a Public Corporation of the State of Florida, on behalf of Florida Atlantic University, which is a party to the foregoing Market Settlement Agreement related to the West Palm Beach, Florida, area;

2. I certify that no monetary consideration was exchanged among the parties in consideration for the settlement; and

3. I certify that The Board of Regents, a Public Corporation of the State of Florida, on behalf of Florida Atlantic University did not file any of the affected applications in order to procure the Settlement.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the United States.



Charles B. Reed, Chancellor

Date: 5/12/95

Declaration of Jody Gleason

I, Jody Gleason, declare as follows:

1. I am Chairman of The School Board of the School District of Palm Beach County, which is a party to the foregoing Market Settlement Agreement related to the West Palm Beach, Florida, area;
2. I certify that neither the School District nor any of its principals has received monetary consideration for the settlement; and
3. I certify that The School District of Palm Beach County did not file any application in order to procure the settlement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of April, 1995.



Jody Gleason, Chairman
The School Board of Palm Beach County,
Florida

Declaration of C. Monica Uhlhorn

I, C. Monica Uhlhorn, declare as follows:

1. I am Superintendent of The School District of Palm Beach County, which is a party to the foregoing Market Settlement Agreement related to the West Palm Beach, Florida, area;
2. I certify that neither the School District nor any of its principals has received monetary consideration for the settlement; and
3. I certify that The School District of Palm Beach County did not file any application in order to procure the settlement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of April, 1995.



C. Monica Uhlhorn, Superintendent
The School District of Palm Beach County,
Florida